U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 14 October 2003

Case No: 2001-BLA-0315

In the Matter of

WILLIAM E. DALTON

Claimant

v.

FRONTIER KEMPER CONSTRUCTORS, INC.

Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Thomas Johnson, Esq.
JOHNSON, JONES, SNELLING, GILBERT & DAVIS
Chicago, Illinois
For Claimant

Mary Lou Smith, Esq.
HOWE, ANDERSON & STEYER
Washington, D.C.
For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On March 14, 2003 Claimant filed a motion to cancel the scheduled hearing and to submit this case on the existing record. Neither the Director nor the Employer had any objections to these requests. Accordingly, by Order of March 19, 2003, I granted Claimant's motion and received into evidence Director Exhibits 1 though 38, Claimant Exhibits 1 through 6, Administrative Law Judge Exhibits 1 through 3, and Joint Exhibit 1. Prior to the closing of the record on May 21, 2003, Claimant submitted two more exhibits and Employer submitted four exhibits. None of these exhibits were objected to by any party. Claimant Exhibit 7 is an affidavit by Claimant dated March 12, 2003. Claimant Exhibit 8 is an affidavit by Roosevelt Brock, a former co-worker of Claimant, dated March 6, 2003. Claimant Exhibits 7 and 8 are hereby admitted into evidence. Employer Exhibits 1 is an x-ray interpretation by Dr. Paul S. Wheeler, dated March 12, 2003. Employer Exhibit 2 is an x-ray interpretation by Dr. William W. Scott, dated March 11, 2003. Employer Exhibit 3 is a second x-ray interpretation by Dr. Wheeler also dated March 12, 2003. Employer Exhibit 4 is a second x-ray interpretation by Dr. Scott also dated March 11, 2003. Employer Exhibits 1 through 4 are hereby admitted into evidence.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the miner's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in

this decision exclusively pertain to that title. References to "DX," "EX," and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively.

ISSUES

The following issues remain for resolution:

1. Whether the person upon whose disability this claim is based is a miner;

2. Whether Claimant worked as a miner after December 31, 1969;

3. The length of Claimant's coal mine employment;

4. Whether the named employer is the responsible operator; and

5. Whether the miner's most recent period of cumulative employment of not less than one year was with the responsible operator.

6. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

7. Whether Claimant's pneumoconiosis arose out of coal mine employment;

8. Whether Claimant is totally disabled; and

9. Whether Claimant's disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, William E. Dalton, was born on April 13, 1927. He married Bobbie Dean Pressley on October 15, 1948, and they resided together until her death on July 26, 2000. (DX 1, 33). Claimant had no children who were under eighteen or dependent upon him at the time this claim was filed. (DX 1).

Mr. Dalton stated in an affidavit dated March 12, 2003 that he has been on supplemental oxygen since December 30, 1998 due to his breathing problems. These problems have worsened since 1991. He suffers from a productive cough and shortness of

breath. He is unable to walk more than fifty to sixty feet without resting and can climb no more than four or five stairs.

Regarding Mr. Dalton's smoking history, the record is consistent in showing that he smoked three-quarters of one package of cigarettes per day for twenty years from 1964 to 1984.

Claimant filed his application for black lung benefits on June 1, 1999. The Office of Workers' Compensation Programs initially awarded the claim on February 2, 2000, but after reviewing additional evidence, denied the claim on March 28, 2000. Pursuant to Claimant's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 37).

Status as a Miner under the Act

Miners and their survivors who establish the applicable elements of entitlement may receive benefits under the Act. 30 U.S.C. §901(a); 20 C.F.R. §718.1(a) (2003). A "miner" is defined as "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal…." 20 C.F.R. §718.202(a) (2003). The regulations provide a rebuttable presumption that "any person working in or around a coal mine or coal preparation facility is a miner." *Id*.

In this case, Claimant worked in mine construction. He was employed by Frontier Kemper Constructors from 1974 until 1991, his last year of employment. Claimant also engaged in mine construction for Cowin & Company, Inc. at the Clinchfield Coal Mine from 1957 to 1958, for McGuire Shaft and Tunnel Corporation from 1967 to 1972, and for Passageway Adit and Tunnel Co., Inc. for four months in 1969. Primarily, he worked as a construction miner and a toplander[1] assisting in the "sinking" of mine shafts and slopes. The regulations address the status of a mine construction worker as a miner under the Act:

> A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in

[1] A toplander is one who "works on the surface at the shaft collar rigging up equipment and performing other manual tasks." (DX 29).

> or around a coal mine or coal preparation facility. … A construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine.

20 C.F.R. §725.202(b) (2003).

In addition, the regulations provide for a rebuttable presumption that a mine construction worker was exposed to coal mine dust "during all periods of employment occurring in or around a coal mine or coal preparation facility" for the purpose of determining status as a miner. 20 C.F.R. §725.202(b)(1) (2003).

Thus, the regulations provide a two-prong test to determine the status of a mine construction worker as a miner under the Act: (1) whether the individual was exposed to coal mine dust during employment in or around a coal mine or coal preparation facility; and (2) whether the individual's work was integral to the building of a coal or underground mine.

Claimant contends that he was continually exposed to coal dust in all his coal mine construction work. In a very detailed work history, Claimant explained that he was subject to coal dust exposure from drilling the shaft through rock and coal seams, from working close to the chutes from which excess coal and rock were dumped, constant exposure from the shaft itself once created, and from the operating mines themselves. He worked on both conventional shafts, which required hand drilling, and raise-bored shafts, which were mechanically drilled. (CX 4). On several projects, Claimant was not working on the surface, but inside the mine at the base of the shaft and exposed to coal dust. Furthermore, Claimant also was exposed to coal mine dust on other jobs for Frontier Kemper. He assisted in installing steel beams underground in the mine ceiling in an operating mine. He had to drill holes in the mine wall, which resulted in significant rock and coal dust exposure. In 1989, Mr. Dalton worked on coal bunker excavation, which again required underground work drilling into the rock and coal. With the exception of construction on a new mine from 1980 to 1983, Mr. Dalton asserts that all of his coal mine construction work took place at operating mines.

The record also contains an affidavit from Roosevelt Brock, a former co-worker of Mr. Dalton. (CX 8). Mr. Brock worked with Claimant in mine construction for Frontier Kemper on a

project in Sesser, Illinois from 1983 until 1985. He represented that Claimant worked underground for two to three months with the "slusher," which pushed rock and coal onto a conveyor belt. He stated that "great amounts of coal and rock dust were stirred up in the air" while doing that work. Mr. Brock attested that he and Mr. Dalton were exposed to significant amounts of coal dust during surface work as well because rock and coal dust would blow from the pipe coming out of the shaft close to where they were working.

Employer submitted an accounting of the projects on which Mr. Dalton worked during his employ and a letter explaining the type of work in which he was engaged. (DX 29). Employer contends that Claimant's work on raise-bored shafts resulted in minimal coal dust exposure. Employer also noted that there was limited chance for exposure when Claimant was working on ventilation shaft projects as they were "typically…not located at or near the mine facility." (DX 29). Furthermore, Employer states that regardless of the type of drilling or type of shaft being created, that the drilling was done through rock and not coal; however, Employer also states that "[t]he only exposure to coal dust would result from excavating through small coal seams while sinking conventional shafts and/or performing bottom excavation activities." (DX 29).

Furthermore, Employer argues that a construction miner can only be considered a "miner" under the Act so far as they are exposed to dust generated from the extraction and preparation of coal. Employer cites to *William Brothers, Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987) and *Bridger Coal Co. v. Director, OWCP [Harrop]*, 927 F.2d 1150 (10th Cir. 1991) in support of its assertion. Using this definition, Employer contends that Claimant could not have been exposed to coal mine dust while engaging in mine construction for a new, not-yet-operable mine in Carmi, Illinois. In addition, Employer asserts that Claimant did not "experience regular or significant exposure" while employed on raise-bored projects as he would not have been exposed to coal mine dust generated in the extraction or preparation of coal.[2] (Employer's Brief at 17-19).

Employer's contentions are at odds with the current case law and regulations on this matter. The Benefits Review Board (BRB) has specifically disagreed with the holding in *Pate*. In *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1991), the BRB held

[2] A raise-bored project refers to the creation of a ventilation or access shaft with the use of mechanical equipment as opposed to a conventional shaft project in which the construction miners would use hand-held machinery to create the shaft.

that "coal dust" and "coal mine dust" are interchangeable terms in the regulations. The BRB determined that "coal mine dust" refers not only to coal mine dust generated in the extraction or preparation of coal, but includes "dust which arises from other activities such as coal mine construction work." *Id*. at 1-80. Similarly, in *Ray v. Williamson Shaft Contracting, Co.*, 14, BLR 1-105, 1-110 (1990), the BRB determined, "there is no statutory authority to limit the coverage of construction employees only to situations in which there is exposure to dust conditions substantially similar to those encountered in underground mining." The comments to the newly revised regulations also clarified the meaning of "coal mine dust" in relation to coal mine construction workers. The Department of Labor (DOL) directly disagreed with the holdings in *Pate* and *Harrop* finding them too narrow. 65 Fed. Reg. 79958 (Dec. 20, 2001). The DOL determined that "'coal mine dust' means any dust generated in the course of coal mining operations, including construction." *Id*. Furthermore, the DOL stated,

> A construction worker who builds the "coal mine" is a "miner" to the extent work at the covered site exposes him or her to "coal mine dust." Moreover, the fact that the claimant worked at non-operational mines is not, by itself, sufficient to establish a lack of coal mine dust exposure. The construction process itself may expose the miner to coal mine dust. In addition, a coal mine construction worker exposed to coal mine dust from an operating coal mine in the vicinity of the construction site is a "miner" under the Black Lung Benefits Act (BLBA). *R&H Steel Buildings v. Director, OWCP*, 146 F.3d 514, 516-17 (7th Cir. 1998).
>
> …Limiting covered construction activities to work involving dust exposure from coal extraction and preparation, however, incorrectly combines two independent elements of the definition of "miner": the "function" requirement for qualifying as a miner under the BLBA, i.e., working in the extraction or preparation or transportation of coal or in coal mine construction, and the exposure requirement for a construction worker. The two are unrelated. The only plausible explanation

> for separately including construction workers in the statutory definition of "miner" is Congress' recognition of their unique functional status. Construction workers generally perform their work before a mine becomes operational. Consequently, they generally will not be involved in the extraction or preparation of coal, or exposed to dust from such activities.

65 Fed. Reg. 79961 (Dec. 20, 2001).

I conclude that Employer has failed to rebut the presumption that Claimant was exposed to coal dust throughout his employment. Employer states that the "potential for coal dust" was limited in Claimant's line of work, but never suggests that he was not exposed to coal dust in these projects. Employer's accounting of Claimant's duties were general and do not speak to his coal dust exposure on each job. Claimant's detailed accounting of his own work experience relates the exact type of work performed and how he was exposed to coal dust. At most, Employer has sought to establish that on certain projects, Claimant's coal dust exposure was minimal. However, "the regulation does not provide for rebuttal by showing the individual was not exposed to 'too much dust'; rather, it must be established that the individual was not regularly exposed to coal mine dust." *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105, 1-110 (1990). I do not find Employer's evidence to be persuasive. I find that Claimant was exposed to coal dust throughout his work in coal mine construction for his work with Frontier Kemper, Cowin Company, McGuire Tunnel and Shaft and Passageway Adit and Tunnel, and I conclude that Employer has failed to rebut the presumption under Section 725.202(b).

Employer further argues that the presumption of coal dust exposure should not be applied to Claimant's pre-1978 employment with Frontier Kemper. On November 9, 1977, amendments to the Act became effective which make the regulations applicable to independent contractors performing services or construction at a mine within the definition of operator. Employer contends that it was "not on notice of potential liability for a black lung claim filed by one of its construction worker employees" prior to that amendment. (Employer's Brief at 20). Employer urges that Mr. Dalton's pre-1978 employment "should be excluded from the total length of Mr. Dalton's coal mine employment." (Employer's Brief at 23).

In support of its position, Employer refers to *Hughes v. Heyl & Patterson, Inc.*, 647 F.2d 452 (4th Cir. 1981). In that case, the claimant filed an application for benefits prior to the amendment including independent contractors. *Id*. at 453. The matter came to a formal hearing after the amendments became effective. *Id*. The employer argued that it could not be held a responsible operator as it was not on notice at the time of the claimant's employment that it could be liable under the Act. *Id*. at 454. The Fourth Circuit held that the amendment could not be applied retroactively and that "persons could be held liable for the violation of standards which they properly believed were not applicable to them at the time of their acts." *Id*. The court noted that this circumstance fell within the exception to the Supreme Court ruling in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 476 (1974) that courts were to apply the "law in effect at the time it renders its decision." *Id*. The court found that retroactive application of the amendment would result in "manifest injustice" to the employer. *Id*.

Employer's argument is not persuasive. Initially, Employer is not contending that it cannot be held the responsible operator for Claimant's pre-1978 employment. Employer is contending that the presumption of coal dust exposure cannot be applied for that time period. Claimant continued to work for Frontier Kemper until 1991; thus, Employer cannot assert absence of notice that Claimant could be considered a miner under the Act. Furthermore, as discussed above, Claimant has established that he was exposed to coal dust throughout his coal mine employment, including that employment prior to 1978. Employer has offered insufficient evidence to show otherwise.

Next, I must determine whether Claimant's work was integral to the building of an underground mine. The regulations define "coal mine" as:

> An area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the

> coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. §725.101(a)(12) (2003).

Throughout his employment, Claimant worked in the construction of ventilation and access shafts, slopes, and excavations. Generally, this employment took place in operating mines. Occasionally, this construction was for new mines. Thus Claimant worked on projects which dealt with structures or features that fall within the definition of a coal mine pursuant to the regulations. Furthermore, all construction work was for underground mines. As access and ventilation shafts are integral to the building of a coal mine, I find that Claimant's work on those projects was integral to the building of an underground coal mine.

Claimant has demonstrated that he was exposed to coal dust through his employment in coal mine construction and that his work was integral to the building of an underground coal mine. Accordingly, I find that Claimant is a miner under the Act.

Post-1969 Coal Mine Employment

I have found Claimant's construction work with Frontier-Kemper to be that of a "miner" under the Act. It is undisputed in the record that Claimant worked for Frontier-Kemper from 1974 until 1991. Therefore, Claimant has established post-1969 coal mine employment.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See, Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Claimant alleged twenty five and a half years of coal mine employment. The evidence in the record includes Social Security Records, employment history forms, statements from Employer regarding Claimant's employment, and an affidavit from Claimant.

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of

computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See, Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc)*; Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

Claimant contends that he worked for eight months during 1957 to 1958 for the Cowin & Company, Inc. sinking a ventilation and access shaft for the Clinchfield Coal Mine. (CX 6, DX 2). The Social Security records provide information for a period beginning in 1959 and ending in 1992. There is no evidence to suggest that Claimant did not perform this work. Therefore, I credit Claimant with eight months of qualifying coal mine employment for the work with Cowin.

Mr. Dalton also worked for McGuire Shaft and Tunnel Corporation (McGuire) from 1967 to 1972. Claimant worked one month for McGuire in 1967 and worked five full years thereafter until 1972. The Social Security records support this assertion. As Claimant's evidence is consistent with the Social Security records and there is no conflicting evidence, I credit Claimant with 5 years and one month of qualifying coal mine employment with McGuire.

In 1969, Mr. Dalton also worked four months for Passageway Adit and Tunnel Company (Passageway). This is evidenced by Claimant's affidavit and the Social Security records. As there is no conflicting evidence I find that Claimant worked four months for Passageway.

Claimant's affidavit, the Social Security records, and Employer's accounting of Claimant's work history establish that Claimant worked for Frontier Kemper for sixteen years from 1974 to 1991. Generally, Claimant's work was constant with Frontier Kemper throughout his employment, but there were periods where he was not assigned to a project. Claimant began working for Employer on August 19, 1974; therefore, he had four months of employment for that year. He worked the entire year for the periods from 1977 until 1982. In 1983, Claimant worked in January, but did not return to work until May. For 1983, Claimant had nine months of employment. Claimant worked the entire years of 1984 and 1985. In 1986, Claimant worked only from January until the end of June; thus, Claimant had six

months of employment with Frontier Kemper that year. Claimant worked all of 1987 and all but December of 1988. In 1989, Claimant did not work January or February, thus working ten months in that year. Claimant worked the entire year for 1990 and left coal mine employment on August 30, 1991. In total, Claimant worked sixteen years for Frontier Kemper. Both Employer and Claimant's statement are consistent in this regard. I conclude that Claimant worked sixteen years for Frontier Kemper.

In sum, Claimant has established twenty-two years and three months of qualifying coal mine employment.

As discussed above, Claimant was a construction miner engaged in the creation of ventilation and access shafts. At the end of his employment with Frontier Kemper, He worked on the surface at the top of the shaft sending needed supplies down to the workers below. He also attached the "mucking machine" to the bottom of the bucket, with which the supplies were sent down. This was accomplished through lifting twenty-five to thirty pound cables over his head to attach the mucking machine to the bucket. He had to climb the ten to fifteen step ladder of the drilling machine to hook the bucket to the drill with the cable. Claimant also made sand bags. He did this work while kneeling, creating thirty to forty bags, and then had to lift the fifty-pound bags one by one to load into the bucket. Claimant was constantly exposed to coal mine dust as he was located twenty to thirty feet from the chute which spewed out the removed coal and rock from the bottom of the shaft.

Responsible Operator

In order to be deemed the responsible operator for this claim, Frontier Kemper must first meet the definition of "operator" under Section 725.491(a). Under this section, the definition of "operator" includes "any owner, lessee or other person who operates, controls, or supervises a coal mine," independent contractors who perform services or construction at coal mines, and "certain other employers, including those engaged in coal mine construction, maintenance, and transportation . . .." 20 C.F.R. § 725.491(a). The Benefits Review Board has held that independent contractors having a continuing presence at a mine are "operators" under the Act. Thus, to be considered as an operator, an employer need not own, operate, supervise, or control a mine facility. *See Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-358 (1985).

Frontier Kemper is a civil and mining construction contractor. Through contracts with coal mining corporations, Frontier Kemper engages in shaft and tunnel development at coal mine sites. Thus Frontier Kemper falls within the definition of operator under Section 725.491(a) as an employer "engaged in coal mine construction.

In order to be the operator that is responsible for this claim, Frontier Kemper must have been the last employer in the coal mining industry for which the miner had his most recent period of coal mine employment of at least one year, including one day after December 31, 1969. 20 C.F.R. §§ 725.492(a), 493(a). The Social Security records and Claimant's employment history forms and affidavit establish that Frontier Kemper was the last employer to meet these conditions. (DX 2, 3, CX 6). Therefore, I find that Frontier Kemper properly is designated as the responsible operator.

MEDICAL EVIDENCE

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
CX 2	12/30/02	01/20/03	Cappiello/B, BCR	2/2; s/t
CX 3	12/30/02	01/21/03	Miller/B, BCR	2/1; t/s
EX 4	12/30/02	03/11/03	Scott/B	Negative for pneumoconiosis
EX 3	12/30/02	03/12/03	Wheeler/B	Negative for pneumoconiosis
CX 1	12/10/02	01/15/03	Ahmed/B, BCR	1/1; t/t
CX 2	11/11/02	01/20/03	Cappiello/B, BCR	2/2; s/t
CX 3	11/11/02	01/21/03	Miller/B, BCR	2/1; t/s
CX 1	11/11/02	01/23/03	Ahmed/B, BCR	2/1; t/s
EX 2	11/11/02	03/11/03	Scott/B	Negative for pneumoconiosis
EX 1	11/11/02	03/12/03	Wheeler/B	Negative for pneumoconiosis
DX 20	01/31/00	01/31/00	Adekunle/unknown	COPD, Fibrotic changes, pulmonary fibrosis
DX 20	11/23/99	11/23/99	Selby/B	Negative for pneumoconiosis

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 20	11/23/99	02/10/00	Scott/B	Emphysema Negative for pneumoconiosis
DX 20	11/23/99	02/11/00	Wheeler/B	Emphysema Negative for pneumoconiosis
DX 14	06/29/99	07/16/99	Capiello/B, BCR	2/1; p/s
DX 12	06/29/99	08/24/99	Gaziano/B	1/0; q/q
DX 30	06/29/99	06/29/00	Scott/B	Negative for pneumoconiosis
DX 30	06/29/99	06/29/00	Wheeler/B	Negative for pneumoconiosis
DX 32	06/29/99	08/31/00	Ahmed/B, BCR	2/1; t/q
DX 32	06/29/99	09/11/00	Miller/B, BCR	2/1; t/q
CX 3	06/29/99	12/12/00	Alexander/B, BCR	½; p/q
DX 20	02/09/99	02/09/99	Adekunle/unknown	COPD
DX 20	01/27/99	01/27/99	Adekunle/unknown	COPD, Interstitial fibrosis
DX 20	01/23/99	01/23/99	Bouffard/unknown	COPD, emphysema
DX 20	01/08/99	01/08/99	Crame/unknown	COPD, negative for acute cardiopulmonary disease
DX 22	01/08/99	03/21/00	Scott/B	Negative for pneumoconiosis
DX 20	12/24/98	12/24/98	Adekunle/unknown	COPD, nodule, fibrotic changes
DX 22	12/24/98	03/21/00	Scott/B	Negative for pneumoconiosis
DX 22	12/24/98	03/21/00	Wheeler/B	Negative for pneumoconiosis
DX 20	12/16/97	12/16/97	Adekunle/unknown	COPD
DX 20	12/09/97	12/09/97	Adekunle/unknown	COPD, Interstitial fibrosis
DX 20	09/19/96	09/19/96	Bouffard/unknown	Emphysema
DX 10	12/12/95	12/12/95	Bouffard/unknown	COPD, emphysema
DX 20	03/25/94	03/25/94	Trivedi/unknown	COPD, emphysema
DX 20	03/26/80	03/26/80	Pruitt/unknown	No active disease

"B" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* 20 C.F.R. § 718.202(a)(ii)(C).

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV1/ FVC	Tracings	Comments
DX 20	Selby	72/65	.77	2.08	25	37	YES	Good cooperation
11/19/99			*.83	*2.12	*29	*39		Severe obstructive defect
DX 7	Carandang	72/64.5	.73	1.89	35	39	YES	Good cooperation
06/29/99			*.79	*2.53		*31		Severe obstructive defect
DX 8	Katzman							Vents on 06/29/99 test acceptable
08/30/99								
DX 10	Beck	68/69	.71	1.59		45	YES	Performed during hospital admission
12/12/95			*.65	*1.60		*41		
DX 20	Trivedi	64/69	.75	1.40	22	54	YES	Severe airway obstruction
06/07/91			*1.02	*1.91	*42	*53		
DX 20	Boren	53/67.25	1.52	2.65	57	57	NO	Fair cooperation
03/20/80								

*post-bronchodilator values

Arterial Blood Gas Studies

Exhibit	Date		pCO2	pO2	Resting/ Exercise
DX 20	11/23/99	Selby	38	67	Resting
DX 11	06/29/99	Carandang	41.5	111.8	Resting
DX 20	02/09/99	Jani	39.8	73.1	Resting

Exhibit	Date		pCO2	pO2	Resting/ Exercise
DX 20	01/30/99	Jani	33	48	Resting
DX 20	01/27/99	Jani	38	82	Resting
DX 20	01/23/99	Jani	33	48.4	Resting
DX 20	01/08/99	Jani	45	194.8	Resting
DX 20	12/25/98	Anadkat	49	90	Resting
DX 20	12/24/98	Jani	38	59	Resting
DX 20	09/23/96	Jani	41.7	67.7	Resting
DX 20	09/19/96	Jani	37.1	66.7	Resting
			44.5	80.5	Exercise

CT Scan

Dr. A. M. Adekunle performed a CT scan on January 6, 1999. (DX 20). Dr. Adekunle noted findings consistent with COPD and pleural scarring. The presence or absence of pneumoconiosis was not addressed.

Dr. Paul S. Wheeler reviewed the January 6, 1999 CT scan on March 20, 2000. (DX 22). He found evidence of moderate emphysema and "minimal linear and regular fibrosis," but found no evidence of pneumoconiosis.

Narrative Medical Evidence

Phillip T. Diaz, M.D., issued a consultative medical report on January 23, 2003. (CX 6). He reviewed the medical evidence of record and recognized Claimant's reporting of a twenty-two-year coal mine construction employment history and a fifteen year smoking history. Dr. Diaz diagnosed Claimant with severe emphysema caused by coal dust exposure and smoking. He opined that Claimant's smoking history was not sufficient alone to cause the severity of Claimant's pulmonary condition. He determined that Claimant is prevented from engaging in his former coal mine employment due to his respiratory impairment. Dr. Diaz is board-certified in Internal Medicine, Pulmonary Medicine, and Critical Care Medicine.

Robert A. C. Cohen, M.D., issued a consultative medical report on January 23, 2003. (CX 5). He reviewed the medical records of evidence and noted Claimant's reported twenty-two year work history in coal mine construction and reported twenty-year smoking history. Dr. Cohen diagnosed Claimant with pneumoconiosis. He based this diagnosis on Claimant's work history, reported symptoms evidenced by other physicians, examination findings reported by other physicians, the results of pulmonary function testing, the results of arterial blood gas testing, positive chest x-rays, and Claimant's significant coal dust exposure. He determined that both smoking and coal dust exposure contributed to Claimant's COPD and supported this assertion with current medical literature. In addition, Dr. Cohen commented on the findings of Dr. Jeff W. Selby. He disagreed with Dr. Selby's speculation that Claimant could be suffering from a bronchospastic lung condition. Dr. Cohen opined that the pulmonary function studies showed no evidence of bronchospasm. Dr. Cohen also noted that there was no significant response to bronchodilators in the administered pulmonary function studies, which led him to disagree with Dr. Selby's contention that steroid treatment would enable Claimant to engage in coal mine employment. Dr. Cohen stated that response to bronchodilators "is predictive of response to steroids." He determined that Claimant was totally disabled as a result of his pulmonary condition. Dr. Cohen is board-certified in Internal Medicine, Pulmonary Medicine and Critical Care Medicine.

Jeff W. Selby, M.D., examined Claimant on November 23, 1999 and issued an examination report on that date. (DX 20). Dr. Selby provided a full pulmonary workup, including a chest x-ray, a pulmonary function study, an arterial blood gas study, and an EKG. Dr. Selby considered accurate work and smoking histories. He diagnosed Claimant with COPD caused solely by smoking. Dr. Selby's reasoning for finding smoking to be the sole cause of Claimant's COPD is:

> While he appears to have more disease than one would normally expect for 15-pack-years, I would be concerned about the accuracy of his smoking history, and I would also be concerned about the possibility of long term bronchospastic disease contributing to or additive to his emphysema or chronic obstructive pulmonary disease. One

> should also take into consideration the possibility of alpha-1 antitrypsin deficiency and other genetic influences.

(DX 20). Dr. Selby suggests that if Claimant were diagnosed with bronchospasm that he might see improvement with the use of steroids and "could have the ability to be employed." Dr. Selby made no determination whether Claimant was capable of performing his former coal mine employment. Dr. Selby is board-certified in Internal Medicine, Pulmonary Disease and Critical Care Medicine.

Reynaldo A. Carandang, M.D., examined Claimant on June 29, 1999 and issued an examination report on that date. (DX 9). Dr. Carandang administered a chest x-ray, a pulmonary function study, and an arterial blood gas study. He considered accurate work and smoking histories. He diagnosed Claimant with pneumoconiosis and COPD. He opined that Claimant's COPD was due to smoking. He did not provide the bases for his diagnosis. Dr. Carandang determined that Claimant's respiratory impairment prevented him from engaging in coal mine employment.

The record also contains medical records reflecting visits to Siddharth B. Jani, M.D., and several hospital admissions. (DX 10, 20). These records reveal ongoing treatment and observation of Claimant's COPD. The treatment notes record examination findings of diminished breath sounds and rhonchi and symptoms of shortness of breath and a productive cough. Dr. Jani recorded the medications prescribed for Mr. Dalton and that he was using supplemental oxygen. The records reveal that a desire to submit Claimant for black lung testing, but do not demonstrate that such testing was ever done. Mr. Dalton was admitted to Wabash Community Hospital several times from September of 1996 to January of 1999. The majority of the hospital admissions were for treatment of exacerbation of COPD. Although the records diagnose Claimant with COPD, the etiology of that condition is not explored in the records.

DISCUSSION AND APPLICABLE LAW

The law of the Seventh Federal Circuit Court of Appeals applies in this case as Claimant's most recent coal mine employment took place in Illinois. *Shupe v. Director,*

OWCP, 12 BLR 1-200, 1-202 (1989); *see also Broyles v. Director, OWCP*, 143 F.3d 1348 (10th Cir. 1998); *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989). Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), the U.S. Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Because pneumoconiosis is a progressive disease, I also may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

The evidence of record contains thirty-five interpretations of seventeen chest x-rays. Of these interpretations, thirteen were negative for pneumoconiosis,

eleven were positive and thirteen diagnosed either COPD or emphysema. The three most recent chest x-rays, taken November 11, 2002, December 20, 2002 and December 30, 2002, are separated from the next most recent x-ray by two years. I find this to be a significant amount of time and assign greater weight to the x-rays taken in 2002. Of those most recent x-rays, six were positive for pneumoconiosis and four were negative. All of the positive interpretations were read by dually qualified physicians. The negative interpretations were read by B-readers. Because the positive readings constitute the majority of most recent interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion.

Dr. Diaz diagnosed Claimant with pneumoconiosis. He opined that a combination of smoking and coal dust exposure caused Claimant’s COPD. He based his finding on the pulmonary function study evidence of record, the x-ray evidence, Claimant’s work history, and examination findings of record. I find Dr. Diaz’s opinion to be well documented and reasoned and entitled to full weight. As Dr. Diaz is a pulmonary specialist, I assign his opinion additional weight.

Dr. Cohen also diagnosed Claimant with pneumoconiosis. In a detailed report, Dr. Cohen based his opinion on the objective and subjective data of record in finding coal dust exposure to contribute to Claimant's COPD. In addition, I am persuaded by Dr. Cohen's explanation that Claimant does not suffer a bronchospastic lung condition that could be aided by bronchodilators or steroids. I find Dr. Cohen's opinion to be well documented and reasoned and entitled to full weight. As he is a pulmonary specialist with superior credentials, I assign his opinion greater weight.

Dr. Selby opined Claimant's COPD was due solely to smoking. Dr. Selby issued a conclusory opinion, not explaining the reasoning behind excluding coal dust exposure as a possible contributor to Claimant's COPD. He suggests a bronchospastic condition or a genetic deficiency to be possible causes, although the record contains no such evidence. I find Dr. Selby's opinion to be poorly reasoned and entitled to less weight.

Dr. Carandang diagnosed Claimant with pneumoconiosis. He did not provide the bases for this diagnosis. As such, I find his opinion to be poorly reasoned and documented and assign it less weight.

Dr. Jani's treatment records establish his continual treatment of Claimant's COPD. However, the records do not discuss the cause of Claimant's COPD. As these records do not discuss the etiology of Claimant's COPD, I find them to be irrelevant to the determination of pneumoconiosis under Section 718.202(a)(4).

In sum, well-documented and reasoned opinions of Drs. Cohen and Diaz, supported by the lesser-weighted opinion of Dr. Carandang, outweigh the opinion of Dr. Selby. I conclude that Claimant has demonstrated pneumoconiosis under Section 718.202(a)(4).

Causation of Pneumoconiosis

Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I have found that Claimant was a coal miner for twenty-two years and three months, and that he had pneumoconiosis. Claimant is entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines. No physician opining as to the presence of pneumoconiosis offers an alternative cause to rebut this presumption. See, *Smith v. Director, OWCP,* 12 BLR 1-156 (1989). Therefore, I find that Claimant's pneumoconiosis arose from his coal mine employment.

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Employer did not address the issue of total disability in its final brief. My Order of May 19, 2003 specified that "[a]ny ISSUE not specifically addressed on brief will be considered abandoned by that party for decisional purposes." (emphasis in original). As Employer has not addressed the issue of total disability in its brief, the issue of total disability is considered abandoned and no longer contested by Employer.

Total Disability due to Pneumoconiosis

Pneumoconiosis must be a "simple contributing cause" of the miner's total disability. *Hawkins v. Director, OWCP*, 907 F.2d 697, 707 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990). Section §718.204(c)(1) provides that a miner is totally disabled due to pneumoconiosis where pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's total disability.

Drs. Cohen and Diaz opined that Claimant's COPD was caused, in part, by coal dust exposure. Both physicians determined that coal dust exposure contributed significantly to Claimant's COPD. Furthermore, Dr. Cohen ruled out other possible causes such as genetic diseases and bronchospastic disease. I find the opinions of Drs.

Cohen and Diaz to be well documented and reasoned and entitled to full weight. As both physicians are pulmonary specialists, I assign their opinions additional weight.

Dr. Selby opined that smoking was the sole cause of Claimant's COPD. Dr. Selby did not explain how he was able to rule out coal dust exposure. I find Dr. Selby's opinion to be conclusory and poorly reasoned, thus I assign it less weight.

Dr. Carandang opined that Claimant's clinical pneumoconiosis was due to coal dust exposure and that his COPD was due to smoking. He did not explain how he arrived at these conclusions. I find his opinion to be poorly documented and reasoned and I assign it less weight.

In well-documented and reasoned opinions, Drs. Cohen and Diaz determined that pneumoconiosis substantially contributed to respiratory impairment which prevents him from returning to coal mine employment. Their opinions, supported by the lesser-weighted opinion of Dr. Carandang, outweigh Dr. Selby's lesser-weighted opinion. Therefore, I find that Claimant has established that he is totally disabled due to pneumoconiosis.

In sum, Claimant has established that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Accordingly, he is entitled to benefits.

ENTITLEMENT

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits begin with the month during which the claim was filed. 20 C.F.R. § 725.503(b). Based upon my review of the record, I cannot determine the month that Claimant became totally disabled due to pneumoconiosis. Consequently, Claimant shall receive benefits commencing June 1, 1999, the month during which this claim was filed.

ATTORNEY'S FEES

An award of attorney's fees for services to the Claimant has not been made in this Decision since no application has been filed by counsel. Claimant's counsel will have fifteen (15) days from the date of receipt of a final Order following the exhaustion of all appeals within which to submit a legal fee application. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The other parties will have fifteen (15) days following the mailing date of the application within which to file objections. If no response is received within this fifteen day period, the parties will be deemed to have waived all objections to the fee requested.

ORDER

Employer, Frontier Kemper Constructors, Inc., is ordered to pay the following:

1. To Claimant, all benefits to which he is entitled under the Act commencing June 1, 1999;

2. To Claimant, all medical and hospitalization benefits to which he is entitled commencing June 1, 1999;

3. To the Secretary of Labor, reimbursement for any payments that the Secretary has made to Claimant under the Act. The Employer may deduct such amounts, as appropriate, from the amount that it is ordered to pay under paragraphs 1 and 2 above. 20 C.F.R. § 725.602; and

4. To Claimant or the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty days from the date of the initial determination of entitlement to benefits. 20 C.F.R. § 725.608.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, ATTN: Clerk of the Board, P. O. Box 37601, Room S-5220, 200 Constitution Avenue, N.W. Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.